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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE: GRAND JURY SUBPOENA DUCES TECUM DATED OCTOBER 29, 1992.

JOHN DOE,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October 4, 1993

QUESTION PRESENTED

Whether the Fifth Amendment privilege against self-incrimination protects an individual from being compelled to disclose confidential entries in his private and personal pocket-diary.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner John Doe respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 21, 1993.

OPINIONS BELOW

The unreported decision and order of the United States District Court for the Southern District of New York, dated January 7, 1993, is reprinted in the Appendix to this Petition ("PA") at 1-6. The opinion of the United States Court of Appeals for the Second Circuit, dated July 21, 1993, is officially reported at 1 F.3d 87 and is reprinted at PA 7-28.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1993. PA 7. On August 27, 1993, the court of appeals denied Mr. Doe's petition for rehearing with a suggestion for rehearing in banc. PA 29. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This petition urges review by the Court of the judgment of a divided panel of the United States Court of Appeals for the Second Circuit that denies any Fifth Amendment protection against compulsory disclosure of the contents of private papers.

The case arises from the issuance of a grand jury subpoena to force Mr. Doe to produce the original version of a confidential personal diary for 1988 that he kept in his breast pocket. The diary, replete with highly personal entries, was prepared and utilized solely by Mr. Doe; no other person had access to it. As he had in prior diaries, Mr. Doe routinely "whited out" certain entries in his day-to-day use of the diary. In 1991, the Securities and Exchange Commission procured a photocopy of the diary, which did not reveal the contents that had been "whited out."[1] The Commission furnished a photocopy of the diary to the United States Attorney, who in October 1992 served a grand-jury subpoena on Mr. Doe, requiring production of the original diary. The Government has conceded that its sole purpose in seeking the original diary is to make use of the contents of the diary underneath the "white out." After Mr. Doe invoked his rights under the Fifth Amendment to withhold the diary, the Government moved in the district court, Milton Pollack, J., to enforce the subpoena. The district court exercised

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1 Mr. Doe produced a photocopy of the diary to the Commission in 1991 solely because of an express agreement that it be held in confidence and not be disclosed to any person or entity other than the Commission without Mr. Doe's permission. The district court found that Mr. Doe's counsel believed he had such an understanding with the Commission; it did not reach the issue of whether the Commission had in fact agreed to maintain the confidentiality of the copy of the diary. PA 2-3.

jurisdiction under 18 U.S.C. § 3231. Following an evidentiary hearing, the district court found that the diary was an "intimate personal document," that the entries sought by the Government had been confidentially maintained, and that compelling production of Mr. Doe's diary would violate the Fifth Amendment. PA 4.

A divided panel of the Second Circuit reversed. The majority affirmed the district court's factual finding that the diary was an "intimate personal document." PA 12 n.1. It held, however, that the Fifth Amendment permits the government to compel a person to produce even his most private and personal documents as long as the creation of the documents was voluntary and the act of producing the documents is not independently incriminatory. PA 13-20. In so deciding, the court refused to follow the holding in *Boyd v. United States*, 116 U.S. 616 (1886), that the Fifth Amendment forbids the compulsory production of private papers. The majority reasoned that the Court's decisions since *Boyd* declining to extend the protection of the Fifth Amendment to the contents of tax and business records foreshadowed the elimination of any privilege concerning the contents of private papers. PA 14-20.[2]

Judge Altimari dissented from the panel's holding. He determined that *Boyd* should govern because the Court had never overruled the decision's protection of private papers. PA 25. In addition, he found that the panel's ruling would "strip the Fifth Amendment privilege of its intended power" and be

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[2] The panel also rejected Mr. Doe's argument that the act of producing the document would be potentially incriminating and his contention that the Government's request for the diary was the unlawful fruit of a breach of a confidentiality agreement between Mr. Doe and the Commission. PA 20-23.

contrary to historic function of the privilege. PA 27. As Judge Altimari stated, "[p]rying open a personal diary and forcing its writer to reveal her innermost thoughts . . . would no doubt have been as reprehensible to our forefathers as prying open a person's lips to extract a confession." *Id.*

Mr. Doe now seeks review on writ of certiorari with respect to the Second Circuit's holding that the Fifth Amendment provides no protection for the contents of private papers.

REASONS FOR GRANTING THE WRIT

This case presents the important question whether the privilege against self-incrimination forbids the government from compelling individuals to turn over private diaries compiled for their own personal use. Although, beginning more than a century ago with *Boyd v. United States*, 116 U.S. 616 (1886), the Court has stated repeatedly that the privilege does protect the contents of private papers, the Second Circuit concluded that it did not. In its view, the reasoning of the Court's later decisions, including *Fisher v. United States*, 425 U.S. 391 (1976), required the conclusion that the privilege no longer protected the contents of *any* voluntarily-prepared document, no matter how intimate in nature and irrespective of the privacy in which the document is kept. PA 15-21.

This decision warrants review for several reasons. First, it is exclusively the role of the Court, and not the lower federal courts, to decide whether *Boyd*'s protection of private papers should be overruled. Although the Court has limited the application of *Boyd* in later cases involving business and tax records, it has emphasized the public character of the documents in issue and expressed that it was not addressing whether the same approach should be taken with respect to private papers.

See United States v. Doe, 465 U.S. 605 (1984); *Fisher*, 425 U.S. at 414.

Second, there is a conflict among the circuits. The lower federal courts, often commenting on the absence of a definitive determination from the Court since *Boyd*, have come to differing conclusions about the protection afforded by the privilege to private papers. *Compare, e.g., United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir.) (following *Boyd*), *cert. denied*, 454 U.S. 862 (1981), *with United States v. Wujkowski*, 929 F.2d 981, 983 (4th Cir. 1991) (finding *Boyd* effectively overruled). Review by the Court would provide needed guidance on an issue of considerable importance.

Third, the decision below fundamentally misconstrues the Fifth Amendment and the Court's decisions. Although the Court has found the privilege inapplicable to the contents of voluntarily-prepared business and tax records, it does not follow, as the Second Circuit supposed, that the privilege is inapplicable to the contents of *all* voluntarily prepared records. Intimate personal documents, in particular, are different in ways that implicate interests the Court has repeatedly recognized under the Fifth Amendment. The preparation of documents for personal and private use, unlike the creation of business records, does not involve any immediate, or reasonably anticipated, communication with others and consequent surrender of autonomy and privacy. When the government demands documents containing mental impressions preserved for private use only, the government is not simply obtaining the contents of the individual's earlier, voluntary "testimony" to others, as in *Fisher* and *Doe*. Rather, in forcing disclosure of private documents, the government is compelling the individual to speak to others and be a "witness against himself" for the first time. It is that compulsion which the privilege explicitly and rightly forbids.

The Second Circuit thus has decided an important issue of unsettled constitutional law and decided it incorrectly. Review by the Court is needed.

A. This Court and the Circuit Courts Have Exhibited Conflicting Views About the Continuing Viability of *Boyd*'s Protection of Private Papers

In 1886, the Court held that the Fifth Amendment privilege against self-incrimination forbids the compelled production of private papers:

> [A]ny compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of a crime . . . is contrary to the principles of a free government. . . . [I]t is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.

Boyd v United States, 116 U.S. 616, 631-32 (1886). For nearly a century, this holding enjoyed an unchallenged reign. *See Bellis v. United States*, 417 U.S. 85, 87 (1974) ("It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony."); *United States v. White*, 322 U.S. 694, 698-99, 701 (1944) (the Fifth Amendment's "historic function [is to protect an individual] from compulsory incrimination through his own testimony or personal records."); *Wilson v. United States*, 221 U.S. 361, 375-77 (1911) ("Undoubtedly, [the privilege against self-incrimination] also

protected him against the compulsory production of his private books and papers.").[3]

In *Fisher*, the Court questioned the scope of this holding. The primary issue was whether the Fifth Amendment entitled a taxpayer to prevent his accountant from producing the accountant's workpapers concerning preparation of the taxpayer's returns. There was no question that the subpoena involved "substantial compulsion." *Id.* at 409. Nevertheless, the Court held that the subpoena did not compel testimonial declarations by the taxpayer, because "[t]he accountant's workpapers are not the taxpayer's. They were not prepared by the taxpayer, and they contain no testimonial declarations by him." *Id.* This conclusion was sufficient to resolve the issue before the Court, because the Fifth Amendment "protects a person only against being incriminated by his own compelled testimonial communications." *Id.* (citations omitted).

The Court made some additional observations:

> Furthermore, . . . the preparation of all the papers sought . . . was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else. The taxpayer cannot avoid compliance with the subpoena *merely* by

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[3] The panel majority below made the novel suggestion that *Boyd*'s holding concerning private papers was but a dictum. PA 19. The Court, however, has explicitly recognized that the "Court in *Boyd* did hold that 'any forcible and compulsory extortion of . . . private papers' . . . violated the . . . Fifth Amendment[ ]." *Couch v. United States*, 409 U.S. 322, 330 (1973) (quoting *Boyd*, 116 U.S. at 630).

> asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else.

Id. at 409-10 (footnote omitted) (emphasis added). The Court ultimately recognized, however, that "[w]hether the Fifth Amendment would shield the taxpayer from producing *his own tax records in his possession* is a question not involved here; for the papers demanded here are not his 'private papers.'" *Id.* at 414 (emphasis added) (quoting *Boyd*, 116 U.S. at 634-35).[4] As the Court had explained only three years earlier, "there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return." *Couch*, 409 U.S. at 335.

Eight years after *Fisher*, the Court considered in *Doe* subpoenas directed to the owner of several companies (sole proprietorships) seeking a variety of the companies' business records. 465 U.S. at 606-07. None of these records (which included telephone records, bank account records, accounting documents, and tax records) appear to have been privately prepared or maintained by the owner personally. Nor was there any evidence that he regarded them as intimate or had maintained their confidentiality. Applying the "rationale" of *Fisher*, the Court held that because these "business records" were not created under compulsion, their contents were not

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[4] The Court has often granted certiorari to resolve questions raised but left undecided in prior decisions. *See, e.g., Local 144 Nursing Home Pension Fund v. Demisay*, 113 S. Ct. 2252, 2257 (1993); *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 495 & n.4 (1981).

protected from involuntary disclosure by the Fifth Amendment. *Id.* at 611-12. The Court repeatedly indicated that its holding was limited to "business records." 465 U.S. at 605, 606, 607 & nn.1, 3, 608, 609, 610 & n.7, 617 & n.17; *see id.* at 612 n.10 (citing cases dealing with "business records"); *see also Braswell v. United States*, 487 U.S. 99, 104, 109 (1988) (referring to the issue in *Doe* as concerning "business records"), *id.* at 120, 121, 122, 124-25 (Kennedy, J., dissenting) (same).

Justice O'Connor wrote separately in *Doe* to "make explicit" what she believed was "implicit in the analysis of [the Court's] opinion: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind" and that *Fisher* had "sounded the death knell for *Boyd*." 465 U.S. at 618 (O'Connor, J., concurring). Justice Brennan and Marshall expressly questioned this interpretation of the Court's opinion. *Id.* (Marshall, J., concurring in part and dissenting in part). Justice O'Connor's concurring opinion was not joined by any Justice.[5]

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[5] In addition to *Fisher* and *Doe*, the Second Circuit relied on *Baltimore Department of Social Services v. Bouknight*, 493 U.S. 549 (1990), which seems wholly inapposite. In *Bouknight*, the Court held that a mother could not invoke the Fifth Amendment to avoid surrendering her child, because production was required as part of a noncriminal regulatory regime. 493 U.S. at 559-62. She contended that the act of producing the child would be incriminatory. The Court, in an opinion authored by Justice O'Connor, stated that "a person may not claim the [Fifth] Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded." *Id.* at 555 (citing *Fisher* and *Doe*). The facts did not present and the Court did not decide whether private papers are protected. Indeed, *Boyd* was not mentioned at all. There was, moreover, no suggestion that producing the child would have revealed thoughts that Bouknight had never before communicated to

Footnote continued

Fisher and *Doe* have spawned disparate rulings in the circuit courts, as revealed in and typified by the opinions below. Two circuits have held that *Boyd*'s holding protecting private papers has retained its vigor.[6] Four circuits have recognized that the Court's decisions leave undecided *Boyd*'s continuing vitality.[7] Finally, three circuits (prior to the decision below) had

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anyone. On the contrary, as Judge Altimari observed below, a "child . . . is produced precisely to take his or her place in a public world." PA 25-27. Had there been any indication that the Court was ruling on the issue of private papers, Justices Brennan and Marshall might have been expected to comment on such a ruling in their dissenting opinion (as they had in *Fisher*), and they did not. *Id.* at 563 (Marshall, J. dissenting).

6 *United States v. Miller*, 660 F.2d 563, 567 (5th Cir. 1981) ("The Supreme Court did not overrule *Boyd* . . . , nor can we.") (citation omitted); *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir.) ("incriminating papers in the actual or constructive possession of an individual, which he holds in his individual capacity . . . and which he himself wrote . . . , are absolutely protected by the *Boyd* principle from production by subpoena or equivalent process"), *cert. denied*, 454 U.S. 862 (1981); *In re Grand Jury Proceedings*, 632 F.2d 1033, 1042-44 (3d Cir. 1980) (recognizing a contents-based Fifth Amendment privilege for "private papers").

7 *In re Grand Jury Investigation*, 921 F.2d 1184, 1187 n.6 (11th Cir. 1991) ("The Supreme Court's own reluctance to overrule *Boyd* . . . counsel[s] in favor of continuing to leave this question open in this circuit."); *United States v. Mason*, 869 F.2d 414, 416 (8th Cir.) ("We need not decide [whether the Fifth Amendment continues to protect the contents of personal papers such as diaries] . . ." since "from the Court's examination of the materials they are not personal diaries"), *cert. denied*, 492 U.S. 907 (1989); *In re Steinberg*, 837 F.2d 527, 530 (1st Cir. 1988)

Footnote continued

stated, primarily in cases not involving private papers, that *Boyd* has been laid entirely to rest.[8]

The lower courts' disparate views of such a fundamental personal liberty beg to be harmonized by the Court.

("We recognize that no other justice used the opportunity presented in *Doe* to join Justice O'Connor in an explicit final burial of *Boyd*."); *Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir.) ("[W]e do not read [*Fisher* or *Doe*] as holding that the contents of private papers are never privileged"), *cert. dismissed*, 473 U.S. 925 (1985); *In re Grand Jury Proceedings*, 626 F.2d 1051, 1055 n.2 (1st Cir. 1980) ("We wish to emphasize that this case does not involve subpoena of papers more intimate or personal than business records. The applicability of *Fisher v. United States* to non-business, intimate personal papers such as private diaries or drafts of letters or essays is an open question."); *United States v. Schlansky*, 709 F.2d 1079, 1083 (6th Cir. 1983) ("It has been suggested that *Boyd* retains its full vigor when applied to those privacies of life which are beyond the pale of legitimate government intrusion. . . . Obviously a financial record which one assembles and delivers to an accountant for the purpose of preparing tax returns does not have the same degree of privacy as a personal diary.") (quotations omitted), *cert. denied*, 465 U.S. 1099 (1984).

[8] *United States v. Wujkowski*, 929 F.2d 981, 983 (4th Cir. 1991); *In re Sealed Case*, 877 F.2d 83, 84 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990); *In re Grand Jury Proceedings on Feb. 4, 1982*, 759 F.2d 1418, 1419 (9th Cir. 1985). In at least two of these three decisions, the documents in question were not private papers, so the statements that *Boyd* no longer protects private papers are dicta. *In re Sealed Case*, 877 F.2d at 84 (business records); *In re Grand Jury Proceedings*, 759 F.2d at 1419 (district court found that documents were not of a "personal nature"). In the third decision, the nature of the documents was ambiguous. *Wujkowski*, 929 F.2d at 986.

e.g., *Braswell*, 487 U.S. at 102 (certiorari granted to resolve a conflict among the courts of appeals concerning whether documents were privileged under the Fifth Amendment), especially because only the Court has the prerogative of deciding whether *Boyd* should be overruled. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

B. The Second Circuit Was Wrong in Eliminating Fifth Amendment Protection For the Contents of Private Papers

The Court has never applied the "rationale" of *Fisher* to compel a person to produce papers he has privately written and maintained. In such a context, Fifth Amendment concerns not implicated in the factual contexts of *Fisher* and *Doe* come to the fore. The Fifth Amendment serves a variety of purposes, some of which have more prominence in certain contexts than in others, *e.g.*, *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 57 (1964) (discussing the many "policies of the privilege"), and the application of the privilege "often depends on the facts and circumstances of the particular case." *Doe v. United States*, 487 U.S. 201, 214-15 (1988) ("*Doe II*").

Foremost among the "policies of the privilege" are promoting "respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life," *id.* at 212 (quoting *Murphy*, 378 U.S. at 55), and abhorrence to forcing a person to "disclose the contents of his own mind" or his "consciousness of the facts and the operations of his mind in expressing it." *Id.* at 211. Put simply, an accused should not be forced to "share his thoughts and beliefs with the Government." *Id.* at 213 (footnote omitted); *see also Braswell*, 487 U.S. at 119 (Kennedy, J., dissenting) (a "critical foundation[ ] for the constitutional guarantee against

self-incrimination" is "protecting the realm of human thought and expression").

The concerns for protecting mental processes and preserving individual autonomy are necessarily tinged with privacy considerations:

> [T]he Fifth Amendment "respects a private inner sanctum of individual feeling and thought" -- an inner sanctum which necessarily includes an individual's papers . . . to the extent that the privilege bars their compulsory production and authentication. . . . *Couch v. United States*, [409 U.S. 322,] 377 [1973]. See also *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). Protection of individual privacy was the major theme running through the Court's decision in *Boyd*, see, *e.g.*, 116 U.S., at 630, and it was on this basis that the Court in *Wilson* distinguished the corporate records involved in that case from the private papers at issue in *Boyd*. *See* [*Wilson v. United States*,] 221 U.S., at 377, 380 [1911].

Bellis v. United States, 417 U.S. 85, 91-92 (1974); *see Katz v. United States*, 389 U.S. 347, 350 n.5 (1967) (the Fifth Amendment reflects some concern for the "right of each individual 'to a private enclave where he may lead a private life'") (citation omitted).

When an individual creates a document, it reflects the "contents of his own mind" and his "consciousness of the facts and the operations of his mind in expressing it." *Doe II*, 487 U.S. at 211 (citations omitted); *see In re Grand Jury Subpoena Duces Tecum*, 741 F. Supp. 1059, 1068 (S.D.N.Y. 1990). In this age of proliferating messages and increasingly complex

demands on individual time, the mind must be relieved by recording thoughts on paper or otherwise. This process, indeed, is often used to clarify or amplify the raw material of the mental process.

The transfer of mental impressions to a writing should not strip the thoughts of constitutional protection where the author maintains his autonomy by keeping the written impressions confidential. Thus, beliefs and observations secreted in a private diary, kept in a breast pocket, should be as inviolable as those locked in the mind. *Cf. Fisher*, 425 U.S. at 404-05 (a document privileged against production under the Fifth Amendment does not lose that privilege because the witness transfers the document in confidence to his lawyer).

The compulsion sanctioned in *Fisher* and *Doe* presented no comparable threat to the inviolability of human thought. The tax workpapers in *Fisher* did not contain the mental impressions or any testimonial declarations of the person invoking the privilege, much less any private or confidential impressions. Likewise, the invasion permitted in *Doe* concerned business records that were created for use and review by many persons other than the witness. Personal autonomy is not threatened by forcing the witness to share with the government writings that were created with the expectation that they would be widely seen and that have in fact been freely published to others.[9]

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[9] In *Fisher*, the Court found support in cases permitting interception of communications under the Fourth Amendment. 425 U.S. at 400. Illustrative of the rationale behind those decisions is the statement from *Olmstead v. United States*, 277 U.S. 438, 436 (1928): "one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside." 277 U.S. at 466. The personal diary, in

Footnote continued

Here, however, the Government seeks to be the first and only outside observer to invade the witness' autonomy and thought processes by probing portions of an intimate document that were designed to be and have been kept private. Nothing in *Fisher* or *Doe* countenances such a result.

This distinction is embodied in the language of the Fifth Amendment, which provides that no person shall be forced to be a "witness" against himself. The common legal understanding of the word "witness" is "one who testifies as to what he has seen, heard, or otherwise observed." *Black's Law Dictionary* 1438 (15th ed. 1979). Inherent in the meaning of "testimony" is the presence of someone who hears and observes. *See Webster's Third New International Dictionary* 2362 (1966) (defining "testimony" as, among other things, "something that serves as an outward sign"). A person who speaks or writes to him or herself in solitude is not acting as a witness and is not testifying.

When the government seeks to breach for the first time the solitude of a paper intended to be private that previously has been seen only by the author, the author is then compelled to be a witness with respect to the paper's contents. Up to that point, he has not been a witness because his statements in the document have not been made to any other person. The author of the document becomes a witness only because the state has coerced the display of the document for observation by others.

In *Doe*, conversely, it is apparent that the target of the subpoena had been a "witness" with respect to the contents of the documents in issue long before the compulsion of the

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contrast, does not project "outside," but is reserved to later reflect thoughts back inside.

sought were bank statements, which necessarily were created for the observation and use of strangers in the normal course of business. 465 U.S. at 606, 607 n.1. When the subpoena was served, Doe was not coerced into becoming a witness for the first time concerning the contents of the documents; he had already made "outward signs" to others concerning their contents.

When the state seeks to coerce the witness to share with others the previously private contents of a personal document, it is coercing testimony as to the contents. The Fifth Amendment prohibits such compulsion.

CONCLUSION

For the foregoing reasons, Mr. Doe's petition for a writ of certiorari should be granted.

Dated: October 4, 1993

Respectfully submitted,

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PETITIONER'S APPENDIX

PA 1

SEALED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

v. M11-189

In re:

Grand Jury Subpoena Duces
Tecum dated October 29, 1992

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January 7, 1993
10:10 a.m.

Before:

HON. MILTON POLLACK,

District Judge

APPEARANCES

OTTO G. OBERMAIER
United States Attorney for the
Southern District of New York
[ ]*
Assistant United States Attorney

[ ]
Attorneys for Witness [ ]
[ ]
[ ]
[ ]

* Brackets indicate redactions authorized by the district court

SEALED DECISION

(Decision of the Court)

THE COURT: Sit down.

It is the decision of the Court as follows:

A copy of the disputed document was submitted to the SEC in the course of an administrative proceeding. The document submitted was not the original but was a copy that was legended at every page thereof as follows:

"This document is provided to the [SEC] solely for its use, and neither the document nor its contents may be disclosed to any person or entity, pursuant to claim of confidentiality made by letter dated January 28, 1991."

That letter clearly indicated that its writer believed he had an understanding with the SEC's staff of confidentiality and nonwaiver of the privilege for the document with respect to any person or entity. The writer's affidavit, as submitted to the Court, which the Court credits, carries forward that understanding.

At a later session of the SEC, on June 14, 1991, the question arose among other representatives for the SEC, whether certain documents were confidential to the SEC only, and counsel for the SEC on that occasion contradicted such a suggestion and said:

"If you're saying that the only circumstances under which you may give it to us is the condition that we agree to keep it from other agencies, we cannot give you that agreement. If another agency makes an access request, we don't limit it to everything but what's been produced by Mr.[ ], unfortunately for you. So if you are saying the only circumstance under which you will provide evidence is that we agree to keep it from other agencies, we can't do that."

SEALED DECISION

That SEC statement was proffered to the Court as a refutation of the stamped legends in question appearing on each page of the copy of the diary submitted to the SEC and supported as to its purpose and effect by the affidavit of counsel for the witness.

The affidavit of the Assistant U.S. Attorney makes a further point, that counsel for the witness was provided at the SEC hearing (at an unstated time) with a copy of an SEC Form No. 1662, which expressly advises witnesses before the SEC that the information provided by them may be provided to the United States attorneys.

However, the resolution of the dispute about restrictive use of the copy by the SEC and whether the SEC can be restricted by any such understanding is beside the point and unnecessary at this time. The issue here relates to the original of a diary which was not turned over to anybody or visually exposed to anybody voluntarily. The original of the diary is an intimate personal document, albeit that some entries may also have had a personal business connotation.

See In Re Grand Jury Subpoena Duces Tecum Dated April 23, 1981, 522 F. Supp. 977, at pages 984-86 (U.S.D.C. 1981, Sofaer, District Judge).

The Fifth Amendment privilege protecting the original before this Court in the possession of the witness and not published to anybody was not waived by disclosure of a purported copy regardless of the controversial legending of the copy.

While the SEC received the legended copy at no time was the original exposed to the Commission. There never was any voluntary disclosure to the SEC nor to anyone else of the original

form of the diary or of any handwriting lurking beneath liquid paper "whiteout" on the diary.

At the last hearing before this Court, as a neutral expedient and to enable the Assistant U.S. Attorney to appraise whether he wished to press for a ruling that might prove unnecessary, at the Court's suggestion it was agreed by counsel, without prejudice to anyone's position, that the government lawyer would be given a visual look at the original. But this would not include any opportunity to require that it be turned over or an opportunity be afforded to make an examination of what might underlay the liquid paper whiteout or to process the document in any way. The Court did not obligate the witness to reveal anything about the original form of the document before the administration thereon of liquid paper whiteout. In short, the privilege against permitting a scientific inspection or subjecting the document to some sort of test procedure or the removal of anything on the face of the document was not waived or consented to. It would be stretching the occurrences to contend otherwise.

To summarize: The diary is an intimate personal document; the content of the original document as originally written or revised was not published to anyone; the disclosure of a purported copy to the SEC was not a publication of the original; the original document was not voluntarily disclosed to the SEC or to the Assistant United States Attorney. The original document is subject to the privilege of the Fifth Amendment in its original and in its present altered (if it was) form.

The government motion for disclosure or for submission for testing the personal diary is denied. So ordered, January 7, 1993, Milton Pollack.

THE COURT: Off the record.

(discussion off the record)

SEALED DECISION

THE COURT: The foregoing, together with all the documents submitted to the Court, constitute a sealed record, and all the documents will be placed under seal, together with a copy of this opinion, and are not to be revealed, by the court reporter's office or otherwise, to anyone except on express order of this Court.

Now, MR. [ ]

MR. [ ] I just wanted to make clear on the record that the Court was ordering our submissions of January 6 and November 12 as well as my affidavit of January 6 could be filed under seal.

THE COURT: Your letter of November 12 is part of what I am putting into the record. As a matter of fact, you supplied me with an extra copy of that letter in yesterday's submission.

MR. [ ]: That is right.

THE COURT: That is all here and I am going to give it all to the clerk, and it is all going into the envelope and you will have everything that you want before the Court.

MR. [ ]: Secondly, I just wanted to articulate an objection that was within the body of my letter, and that is to the consideration of the ex parte affidavit of [ ]. I just want that to be on the record by the government.

THE COURT: Well, that ex parte affidavit will be part of the sealed record and available under seal to any higher court who wishes to review this matter.

SEALED DECISION

MR. [ ]: We want to make it clear that the government objected to its consideration -- the consideration of that affidavit in connection with that motion because we weren't given a copy.

THE COURT: Let me say to you that the affidavit was submitted, but my determination was not influenced by that particular document. Since it was submitted, it shall be part of the sealed record.

MR. [ ] Okay.

THE COURT: I believe that that concludes the matter.

MR. [ ]: Yes. Thank you, your Honor.

MR. [ ]: Thank you, your Honor.

THE COURT: Off the record.

(Discussion off the record)

THE COURT: It is hereby ordered that a copy of these proceedings be prepared and furnished as follows: One, to this Court; two, to Mr.[ ]; three, to Mr.[ ], to be kept by them under the same notion of sealed contents.

MR. [ ]: Thank you, your Honor.

MR. [ ]: Thank you.
(Hearing adjourned)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1497 August Term, 1992

Argued: May 18, 1993 Decided: July 21, 1993

Docket No. 93-1070

IN RE: GRAND JURY SUBPOENA DUCES TECUM
DATED OCTOBER 29, 1992

UNITED STATES OF AMERICA,

Appellant,

-against-

JOHN DOE,

Appellee.

Before: LUMBARD, CARDAMONE, and ALTIMARI,
Circuit Judges.

The government appeals from an order entered in the Southern District of New York, Pollack, *J.*, denying its motion to compel John Doe to comply with a grand jury subpoena duces tecum demanding production of his daily calendar for 1988. Held: the Fifth Amendment does not protect Doe from producing the calendar.

Reversed.

Judge Altimari dissents in a separate opinion.

SCOTT A. EDELMAN, Assistant United States Attorney, New York, New York (Roger S. Hayes, United States Attorney for the Southern District of New York, John W. Auchincloss II, Assistant United States Attorney, New York, New York, of counsel), *for Appellant*.

JED S. RAKOFF, New York, New York (Fried, Frank, Harris, Shriver & Jacobson, New York, New York, John Sullivan, of counsel), for Appellee.

John H. Doyle, III, New York, New York, filed a brief on behalf of New York Council of Defense Lawyers as Amicus Curiae.

LUMBARD, *Circuit Judge*:

The government appeals from an order entered on January 7, 1993 in the Southern District of New York, Pollack, *J.*, denying its motion to compel John Doe to comply with a grand jury subpoena duces tecum dated October 29, 1992. The subpoena commanded Doe to produce "[t]he original version of any diary or calendar for the year 1988, a copy of which has been produced to the SEC." On appeal, the government argues that the court erred in denying its motion to compel because: (1) the Fifth Amendment does not protect the contents of voluntarily prepared, non-business documents such as Doe's calendar; (2) Doe's act of producing the calendar would not constitute compelled testimonial self-incrimination; and (3) enforcement of the subpoena is not barred by alleged governmental misconduct. Because we agree, we reverse.

In 1989, the SEC was investigating possible violations of the federal securities laws by Doe and others. The investigation focused in part on the trading of securities by Doe in his personal brokerage accounts. Pursuant to that investigation, Doe was served with a subpoena dated October 24, 1989, demanding that he appear before the SEC and produce various documents, including his daily calendar for 1988. That calendar is a breast-pocket appointment book which Doe used to record appointments, social engagements, chores, phone numbers, and other reminders.

On January 10, 1990, Doe appeared before the SEC and, on the advice of counsel, responded to the subpoena by asserting his Fifth Amendment privilege against self-incrimination. Thereafter, however, Doe, through new counsel, agreed to withdraw his prior invocation of the Fifth Amendment and comply with the SEC's requests. In return, the SEC agreed, *inter alia*, to: withdraw the subpoena previously served on Doe; agree with Doe as to the timing and scope of future document requests; and extend the time for Doe to respond to any recommendation it might make for enforcement action against him.

On December 6 and 7, 1990, Doe appeared before the SEC in New York and testified about the trading of securities in his personal brokerage accounts. Thereafter, on December 20, 1990, the SEC requested that Doe produce various documents, including "[d]esk calendars, diaries and appointment books kept by him or on his behalf."

On January 28, 1991, Doe complied with that request by producing a number of documents, including a photocopy of the calendar. The documents were submitted with a cover letter from Doe's counsel which stated in part:

> We claim that all materials provided to the Staff during the course of this investigation, including this letter and the documents transmitted herewith, are entitled to confidential treatment.

> Because such documents constitute investigatory records obtained by the Commission in connection with a potential law enforcement proceeding, they certainly are subject, at least at the present, to the exemption from mandatory disclosure under . . . the Freedom of Information Act * * * as well as the protections available under the Privacy Act of 1974. . . .
>
> Accordingly, we expect that all copies of documents produced in connection with the Staff's investigation, including this letter, will be kept in a non-public file and that access to them by any third party not a member of the Commission or its Staff will be denied.

Each page of every document produced by Doe was stamped:

> This document is provided to the United States Securities and Exchange Commission solely for its use, and neither the document nor its contents may be disclosed to any other person or entity, pursuant to a claim of confidentiality made by letter dated JAN 28 1991.

In June 1991, Doe again appeared before the SEC and testified about the documents he had produced in January. In particular, Doe was questioned about calendar entries for March 7, 1988, a date particular importance in the SEC's investigation.

After the SEC concluded its investigation, it brought a civil lawsuit against Doe and others alleging participation by Doe in insider trading.

While the SEC's investigation was pending, the U.S. Attorney's Office for the Southern District of New York requested access to documents produced by Doe. On March 5, 1991, the

SEC granted that request and provided the U.S. Attorney's Office with a copy of the calendar. Upon examining it, the government became suspicious that entries in the original version of the calendar had been "whited-out" with "liquid paper" before it was copied and produced to the SEC. Accordingly, on October 29, 1990, a grand jury, which had been investigating possible perjury and obstruction of justice by Doe and others, issued a subpoena commanding Doe to produce the original version of the calendar.

Doe informed the government that, on the basis of his Fifth Amendment privilege against self-incrimination, he would refuse to produce the calendar. The government then moved to compel Doe to comply with the subpoena. At a November 12, 1992 conference before Judge Pollack, the government advised the court and Doe's counsel of its suspicion that the calendar had been altered, explaining that it wanted to perform physical tests on the original version of the calendar to reveal any entries that had been whited-out. Doe maintained that the subpoena was unenforceable because: (1) the contents of the calendar, as well as the act of producing it, were protected by the Fifth Amendment; and (2) the SEC had breached a confidentiality agreement with him by providing a copy of the calendar to the U.S. Attorney's Office.

Doe's counsel then permitted the government to view the original version of the calendar. The government's examination confirmed its suspicion that numerous entries had been whited-out, including entries for the critical date of March 7, 1988.

At a hearing on January 7, 1993, Judge Pollack denied the government's motion to compel, stating:

> The diary is a [sic] intimate personal document; the content of the original document as originally written or revised was not published to anyone; the disclosure of a purported copy to the SEC was not a publication of the original; the original

> document was not voluntarily disclosed to the SEC or to the Assistant United States Attorney. The original document is subject to the privilege of the Fifth Amendment in its original and its present altered (if it was) form.[1]

This appeal followed.

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[1] For purposes of this appeal, we do not question the district court's characterization of Doe's calendar as an "intimate personal document." That conclusion appears to rest, at least in part, on the determination of factual issues, and therefore it will not be overturned because we do not find it has no support in the record. *See United States v. Doe*, 465 U.S. 605, 614 (1984).

A **Contents-Based Privilege**

Doe maintains that the contents of the calendar are protected from compelled production by the Fifth Amendment's Self-incrimination Clause, which provides, "No person . . . shall be compelled in any criminal case to be a witness against himself." While we have previously left undecided the question of whether the Fifth Amendment "protects the contents of private papers that are not business documents," *In re Proceedings Before August 6, 1984 Grand Jury*, 767 F.2d 39, 41 (2d Cir. 1985), we now rule that it does not.

In arguing for a contents-based privilege, Doe relies principally upon *Boyd v. United States*, 116 U.S. 616 (1886), which involved a civil forfeiture proceeding against two partners charged with importing glass without paying the prescribed duty. Over the partners' objections, the government obtained a court order requiring them to produce the invoice for the glass. After the invoice was admitted at trial, the glass was ordered forfeited. The Supreme Court reversed, holding that the order violated both the Fourth and Fifth Amendments.

In so ruling, the Court concluded that the Fourth Amendment applied to court orders in the nature of subpoenas duces tecum in the same manner that it applied to search warrants, and that the government could not, consistent with the Fourth Amendment, seize a person's documents as evidence unless it had a superior proprietary interest in them. *Id.* at 622-24. The Court also held that a defendant in a criminal or forfeiture case could not be compelled to produce certain evidentiary items without violating the Fifth Amendment, stating, "[A] compulsory production of the private books and papers of the owner of goods sought to be forfeited . . . is compelling him to

be a witness against himself, within the meaning of the Fifth Amendment to the Constitution."[2] *Id.* at 634-35.

Several aspects of the *Boyd* decision did not endure.[3] Nevertheless, the pronouncement in *Boyd* that the Fifth

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2 As one commentator has noted:

> The conceptual basis for [*Boyd*'s protection of the contents of private papers] was never entirely clear, but seemed to rest upon the combined effect of the Fifth Amendment's privilege and the Fourth Amendment's protection against unreasonable searches and seizures. It was regarded as related to, and perhaps part of, the Fourth Amendment's "mere evidence" rule, a prohibition against the seizure and use of items that were neither contraband nor instruments or fruits of crime but of value to the prosecution because they were evidence that a crime was committed or that a particular person committed it.

1 *McCormick On Evidence* § 127, at 464 (4th ed. 1992).

3 As the Supreme Court has observed:

> The application of the Fourth Amendment to subpoenas was limited by *Hale v. Henkel*, 201 U.S. 43 (1906), and more recent cases. *See, e.g., Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946). Purely evidentiary (but "non-testimonial") materials, as well as contraband and fruits and instrumentalities of crime, may now be searched for and seized under proper circumstances, *Warden v. Hayden*, 387 U.S. 294 (1967). Also, any notion that "testimonial" evidence may never be seized and used in evidence is inconsistent with *Katz v. United States*, 389 U.S. 347 (1967); *Osborn v. United States*,

Footnote continued

Amendment protects against the compelled production of private papers often appeared as dictum in later Supreme Court opinions. *See, e.g., Wilson v. United States*, 221 U.S. 361, 377 (1911); *United States v. White*, 322 U.S. 694, 698-99 (1944); *Schmerber v. California*, 384 U.S. 757, 763-64 (1966); *Bellis v. United States*, 417 U.S. 85, 87 (1974). In a series of decisions beginning with *Fisher v. United States*, 425 U.S. 391, 408 (1976), however, the Court raised serious doubt as to the continued validity of that pronouncement.

In *Fisher*, the Court ruled that taxpayers' Fifth Amendment privileges against self-incrimination did not shield them or their attorneys from complying with IRS summonses directing the production of tax records prepared by the taxpayers' accountants. Rejecting the taxpayers' reliance on *Boyd*, the Court noted that because much of *Boyd*'s doctrine had "not stood the test of time," *id.* at 407, "the prohibition against forcing the production of private papers has long been a rule searching for a

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Footnote continued from previous page

385 U.S. 323 (1966), and *Berger v. New York*, 388 U.S. 41 (1967), approving the seizure under appropriate circumstances of conversations of a person suspected of crime.

* * *

Furthermore, despite *Boyd*, neither a partnership nor the individual partners are shielded from compelled production of partnership records on self-incrimination grounds. *Bellis v. United States*, 417 U.S. 85 (1974).

Fisher v. United States, 425 U.S. 391, 407-08 (1976) (footnote omitted).

rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him." *Id.* at 409.

The Court also emphasized that "the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating." *Id.* at 408 (emphasis omitted). Since the accountants' papers were not prepared by the taxpayers, "they contain[ed] no testimonial declarations by [them]." *Id.* at 409. And since "the preparation of all of the papers sought . . . was wholly voluntary, . . . they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else." *Id.* at 409-10 (footnote omitted). The Court thus concluded that the summonses were enforceable unless the act of producing the documents was itself subject to a valid Fifth Amendment privilege. *Id.* at 410.

The *Fisher* Court also rejected the notion, which it traced to *Boyd*, that the Fifth Amendment provides any general protection of privacy:

> Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort.
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> * * *
>
> We cannot cut the Fifth Amendment completely loose from the moorings of its language, and

> make it serve as a general protector of privacy - a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against "compelled self-incrimination, not [the disclosure] of private information." *United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975).

Id. at 399-401 (alteration in original) (footnote omitted). Nevertheless, the Court expressly declined to decide whether the Fifth Amendment would protect against the disclosure of "private papers" such as a taxpayer's "own tax records in his possession." *Id.* at 414.

In *Andresen v. Maryland*, 427 U.S. 463 (1976), decided shortly after *Fisher*, the Court reiterated that any self-incrimination analysis must focus on the voluntariness of the communication at issue. Rejecting a claim that the Fifth Amendment was violated by the use against a criminal defendant of personal business records seized pursuant to a lawful search, the Court reasoned that because the records had been "voluntarily committed to writing," and because the defendant had not been forced to produce or authenticate them, use of the records did not compel the defendant to incriminate himself. *Id.* at 473.

Then in *United States v. Doe*, 465 U.S. 605 (1984), the Court reaffirmed its holding in *Fisher* and answered in the negative the question it had left open in that case, ruling that the Fifth Amendment does not protect the contents of an individual's business records in his own possession. Emphasizing that the Amendment "protects the person asserting the privilege only from *compelled* self-incrimination," *id.* at 610, the Court held in substance that because the documents at issue were prepared voluntarily, they "'cannot be said to contain compelled testimonial evidence' in and of themselves." *Id.* at 612 n.9 (citation omitted). Although the documents at issue were business records, the Court

stated broadly, "If the party asserting the Fifth Amendment privilege has voluntarily complied the document, no compulsion is present and the contents of the document are not privileged." *Id.* at 612 n.10.

In a separate concurring opinion, Justice O'Connor wrote:

> I write separately . . . just to make explicit what is implicit in the analysis of [the Court's] opinion: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind. The notion that the Fifth Amendment protects the privacy of papers originated in *Boyd v. United States*, 116 U.S. 616 (1886), but our decision in *Fisher v. United States*, 425 U.S. 391 (1976), sounded the death knell for *Boyd*. "Several of *Boyd*'s express or implicit declarations [had] not stood the test of time," 425 U.S. at 407, and its privacy of papers concept "ha[d] long been a rule searching for a rationale . . . ." *Id.* at 409. Today's decision puts a long overdue end to that fruitless search.

Id. at 618 (second and third alterations in original). While no other justice joined in Justice O'Connor's opinion, the decision in *Baltimore Dep't of Social Servs. v. Bouknight*, 493 U.S. 549 (1990), suggests that a majority of the Court now agrees with her position.

In *Bouknight*, the Court ruled that the Fifth Amendment did not shield a mother from complying with a juvenile court order directing her to produce her infant son. Citing Justice O'Connor's *Doe* concurrence, the Court stated that "a person may not claim the Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded." *Id.* at 555. The Court thus concluded that any Fifth Amendment privilege would have to arise from the act of

production, because "[w]hen the government demands that an item be produced, 'the only thing compelled is the act of producing the [item].'" *Id.* at 554-55 (alteration in original) (quoting *Fisher*, 425 U.S. at 410 n.11).

Notwithstanding these recent decisions, Doe contends that *Boyd* still controls this case, compelling the conclusion that the Fifth Amendment protects the contents of voluntarily prepared, non-business documents such as the calendar. We disagree.

First, *Boyd* concerned business documents, and therefore its declarations regarding the Fifth Amendment's protection of non-business documents were dicta. While the dicta of the Supreme Court merits our deference, we also heed Chief Justice Marshall's admonition that:

> general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision . . . .

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821), *quoted in Donovan v. Red Star Marine Servs.*, 739 F.2d 774, 782 (2d Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

Second, the Supreme Court's more recent opinions indicate that *Boyd*'s foundations have eroded. The Court no longer views the Fifth Amendment as a general protector of privacy or private information, but leaves that role to the Fourth Amendment. *See Fisher*, 425 U.S. at 401; *see also Doe*, 465 U.S. at 610-11 n.8. Self-incrimination analysis now focuses on whether the creation of the thing demanded was compelled and, if not, whether the act of producing it would constitute compelled testimonial communication. *See Doe*, 465 U.S. at 612; *Andresen*, 427 U.S. at 473; *Fisher*, 425 U.S. at 409-410. Further, the

Bouknight Court's citation of Justice O'Connor's *Doe* concurrence indicates that this analysis applies regardless of "the contents or nature of the thing demanded." 493 U.S. at 555.

Third, the three courts of appeals that have considered this question have all concluded that the Fifth Amendment does not protect the contents of voluntarily prepared documents, business or personal. *See United States v. Wujkowski*, 929 F.2d 981, 983, 985 (4th Cir. 1991) (contents of appointment books and records relating to vacation home not privileged under Fifth Amendment), *aff'd after remand sub nom., United States v. Stone*, 976 F.2d 909 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1843 (1993); *In re Sealed Case*, 877 F.2d 83, 84 (D.C. Cir. 1989) (privilege "does not cover the *contents* of any voluntarily prepared records, including personal ones"), *cert. denied*, 493 U.S. 1044 (1990); *In re Grand Jury Proceedings*, 759 F.2d 1418, 1419 (9th Cir. 1985) (contents of business and personal documents are not privileged "in the absence of some showing that creation of the documents was the product of compulsion").

For these reasons, we conclude that because Doe voluntarily prepared the calendar, its contents are not protected by the Fifth Amendment.

B. Act of Production Privilege

While the contents of voluntarily prepared documents are not privileged, the act of producing them in response to a subpoena may require incriminating testimony in two situations: (1) "if the existence and location of the subpoenaed papers are unknown to the government"; or (2) where production would "implicitly authenticate" the documents. *United States v. Fox*, 721 F.2d 32, 36 (2d Cir. 1983) (citations omitted). Because neither of these situations exists here, Doe has no act of production privilege.

Production may not be refused "[i]f the government can demonstrate with reasonable particularity that it knows of the existence and location of subpoenaed documents." *In re Grand Jury Subpoena Duces Tecum*, 616 F. Supp. 1159, 1161 (E.D.N.Y. 1985). Since Doe produced a copy of the calendar to the SEC and testified about his possession and use of it, its existence and location are "foregone conclusions[s]," and his production of the original "adds little or nothing to the sum total of the Government's information." *Fisher*, 425 U.S. at 411.

Nor would Doe's compliance with the subpoena implicitly authenticate the calendar; his production is not "a necessary link to incriminating evidence contained in [it]." *Fox*, 721 F.2d at 38 (quoting *In re Grand Jury Proceedings United States (Martinez)*, 626 F.2d 1051, 1055 (1st Cir. 1980)). The government could authenticate the calendar, either in the grand jury or at trial, simply by establishing Doe's prior production of the copy to the SEC and asking the trier of fact to compare the copy and the original. Such a comparison, considered in light of Doe's SEC testimony regarding his use of the calendar, would leave no doubt that the calendar was that described in the subpoena.

Accordingly, because Doe's compliance with the subpoena would require mere "surrender" of the calendar, and not "testimony," Doe has no act of production privilege. *See Fisher*, 425 U.S. at 411.

C. Governmental Misconduct

The grand jury plans a "special role in insuring fair and effective law enforcement." *United States v. Calandra*, 414 U.S. 338, 343 (1974). As the Supreme Court has emphasized, that role "necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it." *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972). Therefore, the grand jury's "investigative powers are necessarily broad," and "the longstanding principle that 'the public . . . has the

right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, is particularly applicable to grand jury proceedings." *Id.* at 688 (citations omitted).

Against this broad power, Doe contends that the subpoena may not be enforced because, by providing the calendar to the U.S. Attorney's Office, the SEC breached an agreement not to disclose to third parties any documents produced by him. Therefore, Doe argues, the subpoena for the original version of the calendar should not be enforced "because it is the tainted fruit of a breach of the conditions under which a copy of the [calendar] was made available to the SEC." We are not persuaded.

We seriously question whether Doe actually procured an agreement for the SEC not to disclose the calendar to the U.S. Attorney's Office. The alleged agreement upon which Doe relies consists merely of a one-sided request by his attorney for confidential treatment of documents produced. Doe offers no evidence that the SEC agreed to this condition, and the SEC attorney involved denies having done so. Furthermore, such an agreement would conflict with standard SEC practice, reflected on a form provided to Doe's counsel, which states:

> The Commission often makes its files available to other government agencies, particularly United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate. Whether or not the Commission makes its files available to other governmental agencies is, in general, a confidential matter between the Commission and such other governmental agencies.

We need not resolve this issue, however, because even if Doe obtained such an agreement from the SEC, he suffered no

prejudice from the SEC's purported breach of it. There can be no doubt that had the SEC refused a request by the U.S. Attorney's Office for a copy of the calendar, the grand jury would have subpoenaed it. Such a subpoena could have been directed either to the SEC or to Doe's co-defendant in the SEC's civil suit, who had obtained a copy of the calendar from the SEC during discovery. Doe has not shown that the grand jury would have been unable to obtain a copy of the calendar from either of those sources.[4]

We therefore conclude that Doe suffered no prejudice in this proceeding from the SEC's alleged wrongful disclosure of the

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4 Doe's reliance on *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979) is misplaced. There, we affirmed a district court order denying the government's informal request for transcripts of depositions taken in a private civil action which were subject to a protective order approved by the court pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. In so ruling, we reasoned that the interest in the enforcement of Rule 26(c) orders was sufficient to outweigh the government's interest in obtaining information by means of an informal document request. *Id.* at 295-96.

Here, by contrast, the government has not requested Doe's calendar informally, but through a grand jury subpoena. Further, documents produced by Doe to the SEC are not subject to a Rule 26(c) protective order, but merely to an alleged agreement of confidentiality. On this record, we cannot say that the interests underlying enforcement of that agreement are sufficient to trump the grand jury's interest in obtaining evidence of possible criminal conduct by Doe.

calendar, and the subpoena is not rendered unenforceable by governmental misconduct.

Reversed.

United States v. John Doe, No. 93-1070

ALTIMARI, Circuit Judge, dissenting:

Because I believe that the Supreme Court's pronouncement in *Boyd v. United States*, 116 U.S. 616, 634-35 (1886) that "a compulsory production of the private books and papers of the owner of goods sought to be forfeited . . . is compelling to him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution" remains valid, I respectfully dissent.

The proposition in *Boyd* regarding the Fifth Amendment protection of private papers has been repeated in a number of subsequent opinions. *See Wilson v. United States*, 221 U.S. 361, 377 (1911); *United States v. White*, 322 U.S. 694, 698 (1944); *Couch v. United States*, 409 U.S. 322, 330 (1973); *Bellis v. United States*, 417 U.S. 85, 87 (1974). The majority maintains, however, that *Boyd*'s foundations have been eroded by more recent Supreme Court decisions. Admittedly, certain elements of the *Boyd* decision have been overturned. *See Warden v. Hayden*, 387 U.S. 294, 301-302 (1967) (rejecting parts of *Boyd*'s holding regarding the Fourth Amendment). The *Boyd* pronouncement at issue here, however, has never been expressly overruled, nor has a majority of the Court indicated that it would so rule in a case dealing with personal papers.

The Supreme Court cases that the majority relies upon to support its contentions are distinguishable. In *Fisher v. United States*, 425 U.S. 391 (1976), the government sought to compel the production of documents prepared by accountants that related to their clients' tax returns. In the case at bar, the government seeks to compel production of the contents of defendant's day calendar, a document that even the majority agrees is an "intimate personal document." In *Fisher*, although the Court concluded that the documents must be produced, the Court specifically stated that because the case before it did not involve the witnesses's private

papers, it was not resolving the question of whether such documents could be compelled. *See id.* at 414 ("Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers.'"). Accordingly, the Court's analysis in *Fisher* relating to the "act of production privilege" and the voluntariness of producing the document does not necessarily relate to private papers. The majority's reference to *Andresen v. Maryland*, 427 U.S. 463 (1976), another case involving business records, is therefore equally off the mark.

In *United States v. Doe*, 465 U.S. 605 (1984), yet another case dealing with the compelled production of business documents, the Court focused on whether the document was voluntarily compiled. See *id.* at 612 n.10. Because *Doe*, like *Fisher*, involved business records, it leaves open the question of whether the Court would apply the voluntariness analysis to personal papers. Although Justice O'Connor wrote separately to specifically state that the Fifth Amendment "provides absolutely no protection for the contents of private papers of any kind," *id.* at 618, no other Justice joined in her opinion. Moreover, two other Justices wrote separately in order to express their opinions that the Fifth Amendment continued to protect the contents of certain personal documents. *See id.* at 618-19 (Marshall, J. joined by Brennan, J., concurring in part and dissenting in part).

Although the majority admits that Justice O'Connor was not speaking for the Court in *Doe*, it finds that the decision in *Baltimore Dep't of Social Servs. v. Bouknight*, 493 U.S. 549 (1990), indicates that a majority of the Court now agrees with her position. *Bouknight*, however, involved the compelled production of a child, not the production of personal papers. I find the two incomparable. The compelled production of a diary, an unpublished, written expression of one's innermost thoughts, forces the involuntary disclosure of the contents of one's mind. The compelled production of a child, on the other hand, is in no

way its equivalent. A child, although the result of a private experience, is produced precisely to take his or her place in a public world. Therefore, although the Court found that the privilege against testimonial self-incrimination cannot be invoked to prevent the compelled presence of another person, it can still be invoked to prevent the compelled production of a personal diary.

The majority relies on the decisions of three circuits that have concluded that voluntarily prepared personal papers are not protected by the Fifth Amendment. The majority, however, neglects to cite to a decision of the Third Circuit finding that "the fifth amendment protects an accused from government-compelled disclosure of self-incriminating private papers, such as purely personal date books." *In re Grand Jury Proceedings*, 632 F.2d 1033, 1042 (3d Cir. 1980). Furthermore, three other circuits, although refusing to decide the matter, have made statements that leave room for some kind of exception for personal papers. *See Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir.) (leaving open the possibility that private papers may be protected where compelled disclosure would "break the heart of our sense of privacy") (citations omitted), *cert. dismissed*, 473 U.S. 925 (1985); *In re Steinberg*, 837 F.2d 527, 530 (1st Cir. 1988) (same); *United States v. Mason*, 869 F.2d 414, 416 (8th Cir.) (same), *cert. denied*, 492 U.S. 907 (1989). The Eleventh Circuit, also refusing to rule on the continued vitality of *Boyd*, has made reference to the Supreme Court's own reluctance to overrule *Boyd*. *See In re Grand Jury Investigation*, 921 F.2d 1184, 1187 n.6 (11th Cir. 1991). Given these decisions, it seems far from clear that *Fisher* and *Bouknight* have struck the "death knell" for *Boyd* as the majority maintains.

To hold that a person must divulge self-incriminating statements merely because she chose to write them down rather than keep them sealed in her head, is to strip the Fifth Amendment privilege of its intended power. Prying open a personal diary and forcing its writer to reveal her innermost thoughts, however incriminating they may be, would no doubt have been as

reprehensible to our forefathers as prying open a person's lips to extract a confession.

In sum, although *Boyd*'s continued vitality has been questioned, its pronouncement that personal papers are protected by the Fifth Amendment has never been expressly overruled. Its reasoning should therefore continue to be applied until the Supreme Court directs us to do otherwise. Accordingly, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of August one thousand nine hundred and ninety-three.

IN RE: GRAND JURY
SUBPOENA DUCES TECUM DOCKET NUMBER: **93-1070**
DATED OCTOBER 29, 1992.

UNITED STATES OF AMERICA,

APPELLANT,

v.

JOHN DOE,

APPELLEE.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by **APPELLEE JOHN DOE**.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH,
Clerk

No. 93-523

JAN 3 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
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QUESTION PRESENTED

Whether the Fifth Amendment privilege against compelled self-incrimination justified petitioner's refusal to comply with a subpoena requiring the production of his personal calendar.

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In the Supreme Court of the United States

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No. 93-523

JOHN DOE, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A28) is reported at 1 F.3d 87. The opinion of the district court (Pet. App. A1-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1993. A petition for rehearing was denied on August 27, 1993. Pet. App. A29. The petition for a writ of certiorari was filed on October 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 29, 1992, a federal grand jury in the Southern District of New York issued a subpoena requiring petitioner to produce his personal calendar for 1988. After petitioner refused to comply with the subpoena, the government moved to compel production of the subpoenaed document. The district court denied the government's motion. Pet. App. A1-A6. The court of appeals reversed. *Id.* at A7-A28.

1. In 1989, as part of an investigation of insider trading involving petitioner and others, the Securities and Exchange Commission (SEC) served petitioner with a subpoena requiring him to produce various documents, including his personal calendar for 1988. Petitioner used the calendar to record appointments, social engagements, chores, telephone numbers, and other reminders. Pet. App. A9. After initially resisting the subpoena, petitioner agreed to supply the requested documents. In return, the SEC agreed to withdraw the subpoena. *Ibid.*

On December 20, 1990, the SEC requested that petitioner produce any "[d]esk calendars, diaries and appointment books kept by him or on his behalf." On January 28, 1991, petitioner complied with that request by producing a number of documents, including a photocopy of his 1988 calendar. Petitioner submitted a letter with those documents "claim[ing] that all materials provided to the Staff during the course of this investigation, including this letter and the documents transmitted herewith, are entitled to confidential treatment." In addition, every page of the documents produced by petitioner bore a stamp stating that the document was "provided to the [SEC] solely for its use, and neither the document nor its contents

may be disclosed to any other person or entity." Pet. App. A2, A9-A10.

While the SEC's investigation was pending, the United States Attorney's Office for the Southern District of New York sought access to the documents produced to the SEC by petitioner. On March 5, 1991, the SEC provided prosecutors with a copy of petitioner's 1988 calendar. From the photocopy of the calendar, it appeared that entries on the original of the calendar may have been "whited out." Pet. App. A10-A11.

On October 29, 1990, a grand jury that had been investigating possible perjury and obstruction of justice charges against petitioner and others issued a subpoena requiring petitioner to produce the original of the calendar. Petitioner informed the government that, based on his Fifth Amendment privilege against compelled self-incrimination, he would refuse to comply with the subpoena. The government then moved to compel compliance with the subpoena. At a hearing before the district court, petitioner reasserted his Fifth Amendment claim. He also asserted that the SEC had breached a confidentiality agreement with him by providing a copy of the calendar to the United States Attorney's Office. Pet. App. A11.

The district court granted petitioner's motion to quash the grand jury subpoena, stating:

> The diary is an intimate personal document; the content of the original document as originally written or revised was not published to anyone; the disclosure of a purported copy to the SEC was not a publication of the original; the original document was not voluntarily disclosed to the SEC or to the Assistant United States Attorney. The original document is subject to the privilege

> of the Fifth Amendment in its original and in its present altered (if it was) form.

Pet. App. A4, A11-A12.

2. The court of appeals reversed. Pet. App. A7-A28. It rejected petitioner's contention that statements in *Boyd* v. *United States*, 116 U.S. 616 (1886), authorized petitioner to invoke the Fifth Amendment in refusing to produce his personal calendar. The court acknowledged (Pet. App. A13-A14) that in *Boyd* this Court stated that "a compulsory production of the private books and papers of the owner of goods sought to be forfeited, * * * is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution." 116 U.S. at 634-635. The court of appeals concluded, however, that *Boyd*'s statement that the Fifth Amendment protected against the compelled production of private papers was no longer good law in light of the Court's decisions in *Fisher* v. *United States*, 425 U.S. 391 (1976); *Andresen* v. *Maryland*, 427 U.S. 463 (1976); *United States* v. *Doe*, 465 U.S. 605 (1984); and *Baltimore City Dep't of Social Services* v. *Bouknight*, 493 U.S. 549 (1990).

Although the court of appeals recognized that none of those decisions directly considered the production of "private books and papers," it noted that in *Fisher*, the Court observed that *Boyd*'s approach to private papers was inconsistent with the limitation of the Fifth Amendment privilege to compelled "testimony" that is self-incriminating. Pet. App. A16. In addition, the court of appeals noted that *Fisher*, *Doe*, and *Bouknight* had established that the Fifth Amendment applies only to the testimonial aspect of the act of producing a document in response to a government

demand, and that the preparation of the document does not fall within the privilege if the person asserting the privilege voluntarily created the document.[1] Based on that analysis, the court of appeals concluded that, because petitioner had voluntarily prepared the calendar commanded by a subpoena, he could not rely on the Fifth Amendment to resist its production.[2] Pet. App. A20.

Judge Altimari dissented. He argued that because this Court has never expressly overruled its pronouncement in *Boyd* that the Fifth Amendment privilege protects against the compelled production of "private books and papers," the court of appeals was not free to reach a result inconsistent with *Boyd*. Pet. App. A25-A28.

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[1] In response to petitioner's argument that *Boyd* should control this case because this Court has not explicitly overruled it in all respects, the court of appeals noted that *Boyd* itself "concerned business documents, and therefore its declarations regarding the Fifth Amendment's protection of non-business documents were dicta." Pet. App. A19.

[2] The court of appeals also rejected petitioner's claims, which he does not renew in this Court, that he could resist production of the calendar because the act of production itself was incriminatory and because the SEC engaged in misconduct in turning a photocopy of the calendar over to the United States Attorney's office. Pet. App. A20-A24.

ARGUMENT

The court of appeals correctly concluded that the Fifth Amendment does not protect the contents of the personal calendar subpoenaed from petitioner. Because other courts of appeals have reached conflicting results, however, and because the issue is a recurring one, we believe that this Court's review is appropriate.

1. Petitioner contends (Pet. 5-18) that the Fifth Amendment privilege against compelled self-incrimination justifies his refusal to produce his personal calendar in response to a subpoena. The court of appeals correctly concluded, however, that this Court's statement in *Boyd* that the full protection of the Fifth Amendment extends to the contents of "private books and papers" is no longer an accurate statement of the law.

This Court's recent cases establish that the Fifth Amendment protects only compulsory testimonial communications and not the contents of subpoenaed documents that were voluntarily created. In *Fisher* v. *United States*, *supra*, this Court observed that several aspects of *Boyd* "have not stood the test of time," 425 U.S. at 407, that the Fourth Amendment foundations of the Fifth Amendment doctrine articulated in *Boyd* "have been washed away," 425 U.S. at 409, and thus that *Boyd*'s approach to private papers "has long been a rule searching for a rationale." *Ibid.* Although the Court ultimately concluded that it need not resolve the status under the Fifth Amendment of "private papers," for none were at issue in that case, *id.* at 414, it stated broadly that the Fifth Amendment privilege "applies only when the accused is compelled to make a testimonial communication that is incriminating" and that a witness "cannot avoid compliance

with [a] subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else." *Id.* at 408, 410.

In *Andresen* v. *Maryland*, *supra*, the Court held that the Fifth Amendment does not bar the introduction into evidence of a person's business records, seized during a search of his office. The Court stated that the contents of records "voluntarily committed to writing" are not privileged; only the act of producing such documents is compelled and therefore potentially privileged. 427 U.S. at 473-477. The Court reiterated *Fisher*'s recognition that "the continued validity of the broad statements contained in some of the Court's earlier cases had been discredited by later opinions." 427 U.S. at 472.

In *United States* v. *Doe*, *supra*, this Court again refused to apply *Boyd* to protect the contents of business records that were voluntarily prepared. In that case, the Court held that the Fifth Amendment does not protect the business records of a sole proprietorship. 465 U.S. at 610-612. The Court explained that "[i]f the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged." 465 U.S. at 612 n.10. The Court again noted that, contrary to "language in *Boyd* v. *United States*," the Court has never applied the Fifth Amendment to prevent the acquisition of evidence that "did not involve compelled testimonial self-incrimination of some sort." *Id.* at 610 n.8, quoting *Fisher*, 425 U.S. at 399.[3]

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[3] Justice O'Connor wrote a concurring opinion in *Doe* to make clear her belief "that the Fifth Amendment provides

Finally, in *Baltimore City Dep't of Social Services* v. *Bouknight*, *supra*, the Court stated that "a person may not claim the [Fifth] Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded." 493 U.S. at 555. The Court accordingly rejected a claim that compliance with a juvenile court's order requiring a parent to produce her child or reveal his whereabouts in connection with a protective custody case would violate the Fifth Amendment.

Under those decisions, the court of appeals correctly determined that a witness may not refuse to produce a document based on the personal nature of the contents of the document. *Boyd*'s statements regarding the protection according to private papers under the Fifth Amendment, which were themselves dicta, see *Andresen* v. *Maryland*, 427 U.S. at 471; note 1, *supra*, have not survived the reasoning of later cases.[4]

2. The court of appeals' decision is consistent with the decisions of three other courts of appeals. See *United States* v. *Wujkowski*, 929 F.2d 981, 985 (1991), aff'd after remand *sub nom. United States* v. *Stone*, 976 F.2d 909 (4th Cir. 1992) (per curiam),

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absolutely no protection for the contents of private papers of any kind." *Doe*, 465 U.S. at 618.

[4] Petitioner also asserts (Pet. 13-17) that the protection accorded "private books and papers" in *Boyd* serves to safeguard important privacy interests. The Court rejected that argument in *Fisher*, 425 U.S. at 399, 401, indicating that privacy interests that do not involve "compelled testimonial self-incrimination" cannot find shelter under the Fifth Amendment. See also *United States* v. *Doe*, 465 U.S. at 610 n.8. Because petitioner's entries into his personal calendar were not compelled, he may not resist production of the calendar under the Fifth Amendment.

cert. denied, 113 S. Ct. 1843 (1993); *In re Sealed Case*, 877 F.2d 83, 84 (D.C. Cir. 1989), cert. denied, 493 U.S. 1044 (1990); *In re Grand Jury Proceedings*, 759 F.2d 1418, 1419-1420 (9th Cir. 1985).

As petitioner notes (Pet. 11 & n.6), however, cases from two courts of appeals conflict with the decision of the court of appeals in this case. In *United States* v. *Davis*, 636 F.2d 1028 (5th Cir.), cert. denied, 454 U.S. 862 (1981), the court of appeals held that "any incriminating papers in the actual or constructive possession of an individual, which he holds in his individual capacity, rather than in a representative capacity, and which he himself wrote or which were written under his immediate supervision, are absolutely protected by the *Boyd* principle from production by subpoena or equivalent process, regardless of whether they are business-related or more inherently personal in content." 636 F.2d at 1043 (footnotes omitted).[5] In *In re Grand Jury Proceedings*, 632 F.2d 1033, 1042-1044 (3d Cir. 1980), the court of appeals concluded that the government could not "compel production of the pocket date books of [an individual], without violating his guarantees under the fifth amendment." *Id.* at 1044. In both of those cases, the courts declined to hold that the "private papers" principle of *Boyd* did not survive later decisions of this Court.

Both of those decisions predate this Court's more recent decisions in *Doe* and *Bouknight*, which have removed any remaining question about *Boyd*'s lack of vitality, and it is possible that the Third and Fifth Circuits would reconsider their views if the issue

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[5] *United States* v. *Miller*, 660 F.2d 563, 567 (5th Cir. 1981), followed *Davis*, but was later vacated as moot, 685 F.2d 123 (5th Cir. 1982).

were again presented. Nevertheless, the issue of whether *Boyd* protects particular documents is a recurring one that arises with some frequency. Several courts of appeals have reserved decision on the impact of later Supreme Court cases on *Boyd*'s statements regarding private papers.[6] Many decisions in the trial courts regarding the scope of subpoenas may well be influenced by the uncertainty concerning *Boyd* and it is not always efficient or practical to take an appeal. A decision of this Court that finally resolves the validity of *Boyd* would add useful clarity to this area of the law.[7] Accordingly, we believe that the Court should grant review in this case.

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[6] Pet. 11 n.7; see *In re Grand Jury Investigation*, 921 F.2d 1184, 1187 n.6 (11th Cir. 1991) (declining to reach the issue in large part because the government had not "press[ed] this point" and ruling in any event that trust account records were required to be produced); *United States* v. *Mason*, 869 F.2d 414, 416 (8th Cir.) (authorizing the compelled production of pocket calendars quite similar to the calendar subpoenaed from petitioner), cert. denied, 492 U.S. 907 (1989); *In re Steinberg*, 837 F.2d 527, 528-530 (1st Cir. 1988) (concluding that if *Boyd* ever applies, its reach is limited to extraordinarily private documents and does not cover the chronological notebooks of security personnel at issue there); *Butcher* v. *Bailey*, 753 F.2d 465, 469 (6th Cir.) (requiring production of personal records relating to a bankruptcy estate and noting that if *Boyd* ever applies, its production would be sharply limited), cert. dismissed, 473 U.S. 925 (1985). While those decisions do not assist petitioner, they do illustrate the continuing questions that have been raised about *Boyd*.

[7] To resolve a similar issue, the government filed a petition for a writ of certiorari in *United States* v. *John Doe No. 462*, No. 84-823, which presented the question whether the Fifth Amendment privilege against compelled self-incrimination protects the contents of an individual's voluntarily prepared financial records. In that case, the court of appeals had held,

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

JO ANN HARRIS
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

DECEMBER 1993

"in line with *Boyd*, that the fifth amendment prevents the government from subpoenaing an individual's incriminating papers that are in his possession and are held by him in an individual, as opposed to representative capacity." *United States* v. *John Doe No. 462*, 745 F.2d 834, 840 (4th Cir. 1984). The Court granted the petition, 469 U.S. 1188 (1985), but subsequently vacated the judgment and remanded with instructions to dismiss the case as moot. 471 U.S. 1001 (1985), on remand, *United States* v. *John Doe No. 462*, 763 F.2d 662 (4th Cir. 1985) (per curiam).

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No. 93-523

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

IN RE: GRAND JURY SUBPOENA DUCES TECUM DATED OCTOBER 29, 1992.

JOHN DOE,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

ARGUMENT

This petition for certiorari presents the issue of whether the Fifth Amendment privilege against self-incrimination protects an individual from being compelled to disclose the contents of confidential entries in his private and personal pocket-diary. In its brief, the Government concludes that "[t]he petition for a writ of certiorari should be granted," correctly observing that the courts of appeals have rendered conflicting decisions concerning this constitutional issue and that the question recurs with some frequency. Brief for the United States ("Br.") at 10, 11.[1] Given the Government's concurrence as to the appropriateness of certiorari review, petitioner limits this reply to clarifying two points supportive of granting this petition.

1. First, the Government understates the need for certiorari review to clarify the continuing viability *vel non* of the Court's holding in *Boyd v. United States*, 116 U.S. 616 (1886), that the Fifth Amendment protects the contents of private and personal documents. While implicitly conceding that the Court has never specifically held to the contrary, the Government attempts to minimize *Boyd*'s protection of private papers as "dicta." Br. at 8. The Court has already rejected this assertion. *Couch v. United States*, 409 U.S. 322, 330 (1973) ("*Boyd* did hold that 'any forcible and compulsory extortion of . . . private

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[1] The frequency is considerably greater than appears from the reported decisions (although they are quite numerous), because the issue is most commonly litigated in sealed and unreported proceedings (because of grand jury secrecy) and the district court's interlocutory decision can be immediately appealed as of right only by the Government.

papers' . . . violated the . . . Fifth Amendment[ ]") (quoting *Boyd*, 116 U.S. at 630). Moreover, the Government's reliance for its assertion on *Andresen v. Maryland*, 427 U.S. 463, 471 (1976), is misplaced, since *Andresen* concerned the seizure of documents, rather than a subpoena (as in *Boyd*). Moreover, none of the Court's recent decisions dealing with the Fifth Amendment and the contents of documents has stated that *Boyd*'s protection of private papers is dictum, nor has that generally been the received reading of *Boyd* in the courts of appeals. Petition for Certiorari ("Pet.") at 11-12 & nn.6-8.

If *Boyd*'s protection of private papers from compulsory process is not dictum, that fact alone provides an additional reason for granting certiorari. Although the Government urges that *Boyd* has not survived the "reasoning" of the Court's later decisions, Br. at 8, that question can be answered by the Court and only the Court. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quigas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

2. Second, while recognizing the existence of a conflict among the circuits, the Government understates the extent of that conflict -- and, indeed, the entire confusion in the circuits -- regarding the issue here. For example, the Government conjectures that two of the circuits that have ruled contrary to the ruling of the court of appeals in this case -- *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir.), *cert. denied*, 454 U.S. 862 (1981); and *In re Grand Jury Proceedings*, 632 F.2d 1033, 1042-44 (3d Cir. 1980) -- might reconsider their position based on the Court's later opinions in *United States v. Doe*, 465 U.S. 605 (1984), and *Baltimore Department of Social Services v.*

Bouknight, 493 U.S. 549 (1990). Br. at 9. This speculation is without a sound basis. Quite aside from the fact that neither *Doe* nor *Bouknight* involved private papers, the "rationale" for *Doe* and *Bouknight* was taken directly from *Fisher v. United States*, 425 U.S. 391 (1976) (another case not involving private papers), and the Third and Fifth Circuits in the aforementioned decisions expressly rejected the suggestion that *Fisher* undermined *Boyd*'s protection of private papers. Moreover, at least four other courts of appeals have observed or implied that *Fisher*, *Doe*, and *Bouknight* did not put *Boyd* to rest.[2]

As for the prior circuit court decisions the Government claims are consistent with the decision below, Br. at 8, at least two of the three decisions --*In re Sealed Case*, 877 F.2d 83 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990), and *In re Grand Jury Proceedings on February 4, 1982*, 759 F.2d 1418 (9th Cir. 1985) -- did not involve private papers at all, but business records.[3] Thus, these courts of appeals had no occasion to

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[2] See the decisions from the First, Sixth, Eighth, and Eleventh Circuits cited in the Petition at 11 n.7. *See also In re Grand Jury Subpoena (Maltby)*, 800 F.2d 981, 986 (9th Cir. 1986) (Poole, J., dissenting) (observing that, although the issue was not reached by the panel majority, "the holding in *Doe* is limited to the business records context presented in that case and does not preclude [the witness] from claiming a Fifth Amendment privilege in his personal non-business records"); *United States v. Porter*, 711 F.2d 1397, 1401 (7th Cir. 1983) (finding to be well founded District Court Judge Milton Shadur's determination that "*Boyd* did in fact survive *Fisher*") (dicta).

[3] The preparation of documents for personal and private use, unlike the creation of business records, does not involve communication

Footnote continued

address, and did not address, the issue resolved below and presented for review whether the contents of private papers are protected under the Fifth Amendment. Accordingly, the decision below of a divided Second Circuit panel, far from suggesting any trend toward consistency among the circuits, is simply the latest evidence of the wide appellate disagreement over the question presented here and the consequent need for review by the Court.

Footnote continued from previous page

with others. When the government demands documents containing mental impressions preserved for private use only, it is not simply obtaining the contents of the individual's earlier, voluntary "testimony" to others but is compelling the individual to speak to others and be a "witness against himself" for the first time.

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari and the Brief for the United States, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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